

His answers to my questions about this article were evasive, not forthcoming.

Another telling example is his response to a series of questions from Senator EDWARDS about a 1982 article in which he criticized the IRS decision to deny tax exempt status to Bob Jones University because of its racially discriminatory practices. The article is full of statements revealing a disdain for anti-discrimination policies and warned of a parade of horrors should the government continue to use its spending power to advance such policies.

Yet, in his written responses, Mr. Bybee seems to deny the very clear meaning of his written words. He goes so far as to claim that he was only commenting on the Government's change in position in the case and not the very important public policy issue at the heart of the case. That, it seems to me, is an adventurous reading of the article, at best.

Based on Mr. Bybee's unwillingness to answer any question about his views on a wide range of issues, his distortion of his own limited but telling written record, and the failure of the administration to provide any of his numerous OLC opinions to the Judiciary Committee for review, I must vote no on his nomination to the Ninth Circuit Court of Appeals.

Mr. DURBIN. Mr. President, I rise today in opposition to the nomination of Jay Bybee for the Ninth Circuit Court of Appeals. Mr. Bybee recently passed out of the Judiciary Committee by a vote of 12 to 6.

Mr. Bybee is a smart person and a talented attorney—there is no argument about that. But he is one of the most strident voices in the country in advocating states' rights over Federal rights.

For example—and I think members of the Senate here should take special note of this—he wrote a law review article arguing that the 17th amendment was a bad idea. The 17th amendment, of course, is the amendment that allowed for direct election of United States Senators.

Mr. Bybee believes that ratification of the 17th amendment has resulted in too much power for the Federal government, and too little for the States. Here is what he said in his law review article:

If we are genuinely interested in federalism as a check on the excesses of the national government and therefore, as a means of protecting individuals, we should consider repealing the 17th Amendment.

I, for one, disagree.

On behalf of a conservative foundation, Mr. Bybee wrote a successful amicus brief in the 2000 case *United States v. Morrison*, in which the Supreme Court struck down part of the Violence Against Women Act. Mr. Bybee wrote that Congress had no power under either the Commerce Clause or the 14th amendment to pass crucial provisions of this law. I thought this was settled law 75 years ago. Mr. Bybee thinks it is time to revisit this notion.

In addition, I am troubled by Mr. Bybee's positions regarding gay rights. He has been very critical of the Supreme Court's 1996 decision, *Romer v. Evans*, that struck down a Colorado constitutional amendment that prohibited local governments from passing laws to protect gay people. He called such laws that protect gay people from discrimination "preferences for homosexuals."

In another gay rights case, he wrote a brief defending the Defense Department's policy of subjecting gay and lesbian defense contractors to heightened review before deciding whether to give them security clearances. He argued that this policy was not a violation of the Equal Protection Clause and argued that such reviews were justified, in part, because some gays and lesbians experienced "emotional instability."

I am also concerned that Mr. Bybee—as head of the Justice Department's Office of Legal Counsel—has been involved in shaping some of the most controversial policies of the Ashcroft Justice Department. For example, he may have been involved in the new interpretation of the second amendment.

He may have been involved in the TIPS program, in which people in the United States are encouraged to spy on their neighbors and coworkers and report any conduct they find to be "unusual."

He may have been involved in the decision to declare the al Qaeda and Taliban detainees at Guantanamo Bay as prisoners of war under the Geneva Convention.

I say "may have been involved" because he refused to tell us. In written responses to 20 different questions we posed to him, he gave the following answer:

As an attorney at the Department of Justice, I am obligated to keep confidential the legal advice that I provide to others in the executive branch. I cannot comment on whether or not I have provided any such advice and, if so, the substance of that advice.

Mr. Bybee is the most recent example of an appellate court nominee who has stonewalled the Senate Judiciary Committee. I do not believe that such conduct should be rewarded.

I oppose the nomination of Mr. Bybee to the Ninth Circuit.

#### NOMINATION OF MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT—CONTINUED

##### CLOTURE MOTION

The PRESIDING OFFICER. Under the previous order, the clerk will report the motion to invoke cloture.

The assistant legislative clerk read as follows:

##### CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 21, the nomination of Miguel A.

Estrada to be United States Circuit Judge for the District of Columbia Circuit.

Bill Frist, Orrin Hatch, Trent Lott, Robert F. Bennett, Peter Fitzgerald, Jeff Sessions, John Ensign, Kay Bailey Hutchison, Rick Santorum, Don Nickles, Jim Talent, Lindsey Graham of South Carolina, Lisa Murkowski, Conrad Burns, John Warner, John Sununu, Gordon Smith, Elizabeth Dole, Saxby Chambliss, Christopher Bond, Susan Collins, Wayne Allard, Lamar Alexander, Norm Coleman, Pat Roberts, Craig Thomas, Larry E. Craig, Olympia Snowe, John McCain, James Inhofe, Jon Kyl, Lincoln Chafee, Judd Gregg, Richard G. Lugar, George Allen, Chuck Grassley, George V. Voinovich, Mike Crapo, Michael B. Enzi, Thad Cochran, Mike DeWine, Arlen Specter, Sam Brownback, Ben Nighthorse Campbell, Richard Shelby, Ted Stevens, Chuck Hagel, John Cornyn, Pete Domenici, Mitch McConnell, Jim Bunning.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit shall be brought to a close?

The yeas and nays are required under the rule.

The clerk will call the roll.

The senior assistant bill clerk called the roll.

Mr. REID. I announce that the Senator from Delaware (Mr. BIDEN), the Senator from North Carolina (Mr. EDWARDS), and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

I further announce that, if present and voting, the Senator from North Carolina (Mr. EDWARDS) and the Senator from Massachusetts (Mr. KERRY) would each vote "No."

The PRESIDING OFFICER (Mr. SUNUNU). Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 55, nays 42, as follows:

[Rollcall Vote No. 53 Ex.]

##### YEAS—55

Alexander	Dole	Murkowski
Allard	Domenici	Nelson (FL)
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Breaux	Frist	Santorum
Brownback	Graham (SC)	Sessions
Bunning	Grassley	Shelby
Burns	Gregg	Smith
Campbell	Hagel	Snowe
Chafee	Hatch	Specter
Chambliss	Hutchison	Stevens
Cochran	Inhofe	Sununu
Coleman	Kyl	Talent
Collins	Lott	Thomas
Cornyn	Lugar	Voinovich
Craig	McCain	Warner
Crapo	McConnell	
DeWine	Miller	

##### NAYS—42

Akaka	Clinton	Feingold
Baucus	Conrad	Feinstein
Bayh	Corzine	Graham (FL)
Bingaman	Daschle	Harkin
Boxer	Dayton	Hollings
Byrd	Dodd	Inouye
Cantwell	Dorgan	Jeffords
Carper	Durbin	Johnson

Kennedy	Lieberman	Reid
Kohl	Lincoln	Rockefeller
Landrieu	Mikulski	Sarbanes
Lautenberg	Murray	Schumer
Leahy	Pryor	Stabenow
Levin	Reed	Wyden

## NOT VOTING—3

Biden	Edwards	Kerry
-------	---------	-------

The PRESIDING OFFICER. On this vote, the yeas are 55, the nays are 42. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

JAY S. BYBEE, OF NEVADA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT—Continued

The PRESIDING OFFICER. The Senate will resume consideration of the Bybee nomination.

Who yields time?

Mr. GREGG. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant bill clerk proceeded to call the roll.

Ms. COLLINS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Ms. COLLINS. Mr. President, I ask unanimous consent that I be recognized as in morning business for up to 10 minutes for the purpose of introducing a bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Maine is recognized.

(The remarks of Ms. COLLINS pertaining to the introduction of S. 616 are printed in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Ms. COLLINS. I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, the two leaders have agreed that the vote on the circuit judge would occur at 3:45. I am sure there will be a unanimous consent brought here soon.

Mr. SESSIONS. Mr. President, I ask unanimous consent that at 3:45 all time be yielded and the Senate proceed to the first vote, which is on the confirmation of Mr. Bybee.

The PRESIDING OFFICER (Mr. SMITH). Without objection, it is so ordered.

The Senator from Connecticut.

Mr. DODD. Mr. President, might I inquire, what is the pending business before the Senate?

The PRESIDING OFFICER. The pending business is the nomination of Jay S. Bybee.

Mr. DODD. Mr. President, I ask unanimous consent to proceed as in morning business so as not to interrupt the debate on the nomination.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The remarks of Mr. DODD are printed in today's RECORD under "Morning Business.")

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I want to speak for 3 minutes on the nominee. I can do it before or after my leader on the Judiciary Committee.

Mr. LEAHY. I tell my friend from New York, I have allowed others to go, but one more doesn't bother me, especially someone as good as the Senator from New York. I certainly have no objection.

Mr. SCHUMER. I thank my colleague. I will try to be brief and leave the majority of the remaining time for him.

I rise in support of the nomination of Jay Bybee for the Ninth Circuit Court of Appeals. I realize that my support—I was one of two Democrats on the Judiciary Committee to be for Mr. Bybee—may surprise some people, so I wanted to explain for a few moments why I will be voting to confirm him.

As most of my colleagues know, I use three criteria to evaluate judicial nominees: Excellence, moderation, diversity.

Excellence, legal excellence, Mr. Bybee meets that criteria. Diversity, you can't judge that by one individual, but the Bush administration has been pretty good, certainly not terrible, in terms of diversity.

It is moderation where I have had the greatest problem with some of the President's nominees. I don't believe in judicial nominees too far left or too far right because in each case, they tend to make law, not interpret law, as the Founding Fathers said they should. I believe there has to be balance, balance on the courts. And I have said this many times, but there is nothing wrong with a Justice Scalia on the court if he is balanced by a Justice Marshall. I wouldn't want five Scalias, but one might make a good and interesting and thoughtful court with one Brennan. A Rehnquist should be balanced by a Marshall.

Jay Bybee, make no mistake about it, is a very conservative nominee. It is fair to put him in a similar category with many of the more conservative nominees we have had. If Mr. Bybee were nominated to another court that is hanging in the balance or where most of the nominees were conservative, I probably wouldn't vote for him. If he were nominated for the Supreme Court, for example, there would be a different calculus. But Mr. Bybee is nominated to the Ninth Circuit. The Ninth Circuit is by far the most liberal court in the country. Most of the nominees are Democratic from Democratic Presidents. It is the court that gave us the Pledge of Allegiance case which is

way out of the mainstream on the left side. Therefore, I think Jay Bybee will provide some balance.

Let me repeat, if he were nominated to another court, I might have evaluated this differently. But when it comes to nominations, I mean what I say and I say what I mean. There has to be balance. Standards cannot only apply when they help achieve the desired outcome.

I want to be as fair and honest as I can be in this process. I have developed a set of criteria for evaluating nominees. I don't pretend to change them when after applying those criteria the scales tip in favor of supporting a nominee many of my friends oppose.

I respect those who arrive at a different conclusion. I understand their reasoning. I intend to vote yes on Mr. Bybee.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, we have moved the time up, I realize, in the next 6 minutes for the first vote. That is something I have agreed to accommodate a number of Senators on both sides of the aisle who have commitments. As a result, also as a result of yielding time to the distinguished Senator from Alabama, who had one of the nominees and, of course, appropriately should be speaking, and others, I will not be able to say all the things I wanted to.

I ask unanimous consent that I be recognized for 20 minutes after the conclusion of the final rollcall vote today.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Obviously, as usual, should the leaders have other plans for that, I will do my usual courtesy of yielding to them.

(The remarks of Mr. LEAHY are printed in today's RECORD under "Morning Business.")

The PRESIDING OFFICER. The question is, Will the Senate advise and consent on the nomination of Jay S. Bybee, of Nevada, to be United States Circuit Judge for the Ninth Circuit? On this question, the yeas and nays are required.

Mr. LEAHY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. LEAHY. Mr. President, parliamentary inquiry: Who is the next judge after this?

The PRESIDING OFFICER. That would be Judge Steele from the State of Alabama.

Mr. LEAHY. Mr. President, I understand we also have J. Daniel Breen, of Tennessee, on the list. I ask unanimous consent that it be in order to ask for the yeas and nays on his nomination.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. I ask for the yeas and nays.